

CITY OF LEMON GROVE CITY COUNCIL STAFF REPORT

Item No. 1. E.

Meeting Date: December 4, 2018

Submitted to: Honorable Mayor and Members of the City Council

Department: City Manager's Office

Staff Contact: Shelley Chapel, City Clerk

Schapel@lemongrove.ca.gov

Item Title: City of Lemon Grove Litigation Hold Policy

Recommended Action: Adopt Resolution Approving the City of Lemon Grove Litigation Hold Policy.

Summary:

In relation to the Records Management Program and Policy, a Litigation Hold Policy is regarded as a vital procedure included to ensure that the management of records tagged for litigation are maintained for the duration of the matter.

A Litigation Hold is a procedure used by executive staff and initially issued by the City Attorney to ensure any and all records that are related to a matter be retained until the matter is resolved. This may include retaining the records past the required retention period included in the City's Records Retention Schedule. The records will be held indefinitely until the matter has been resolved and the City Attorney has released the hold.

Discussion:

The purpose of the Litigation Hold Policy is to establish the authority and process for initiating, implementing, monitoring and releasing legal holds.

The Litigation Hold process will be managed by the City Attorney, City Manager and City Clerk (Executive Staff). The Executive Staff will be assisted by City staff in all departments to ensure the record retention and production of records will be protected. This policy will apply to all personnel, elected officials, contractors, consultants, board, commission and committee members, and covers all records, regardless of format and storage location.

A Procedure has been formalized to ensure the integrity of records during litigation are maintained. (Attachment C)

Environmental Review:

☒ Not subject to review

☐ Negative Declaration

☐ Categorical Exemption, Section []

☐ Mitigated Negative Declaration

Fiscal Impact: None.

Public Notification: None.

Attachments:

Attachment A –Resolution No._____, and adopting the City of Lemon Grove Litigation Hold Policy.

Attachment B – Litigation Hold Policy

Attachment C - Litigation Hold Procedure

RESOLUTION NO. 2018-

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LEMON GROVE,
CALIFORNIA, ADOPTING THE LITIGATION HOLD POLICY AND PROCEDURE**

WHEREAS, The purpose of the Litigation Hold Policy is to establish the authority and process for initiating, implementing, monitoring and releasing legal holds.

WHEREAS, All personnel, elected officials, contractors, consultants, board, commission and committee members who are in possession or have control of records regardless of format and storage location, that are subject to legal hold will be held responsible to carry out the Litigation Hold when notified.

WHEREAS, In relation to the Records Management Program and Policy, a Litigation Hold Policy is regarded as a vital procedure included to ensure that the management of records tagged for litigation are maintained for the duration of the matter.

WHEREAS, It is a violation of law and this policy to destroy, alter, withhold, or obscure Evidence once a Legal Hold has been initiated. Violations of this policy are subject to disciplinary action up to and including termination.

WHEREAS, This policy will be procedural until superceded or a time certain when it is no longer required.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Lemon Grove, California, hereby approves the Litigation Hold Policy.

PASSED AND ADOPTED on _____, 2018, the City Council of the City of Lemon Grove, California, adopted Resolution No. 2018-_____, passed by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Raquel Vasquez, Mayor

Attest:

Shelley Chapel, MMC, City Clerk

Approved as to Form:

Kristen Steinke, Assistant City Attorney

City of Lemon Grove
Litigation Hold Notice Policy

- Federal Law:
Duty to preserve evidence “which it knows or reasonably should know is relevant to the action.” In re Napster, Inc. Copyright Litigation 462 F. Supp 2d 1060, 1067 (N.D. Cal 2006)
Duty attaches “from the moment that litigation is reasonably anticipated.” Apple Inc. v Samsung Elect. Co. Ltd. 881 F. Supp 2d 1132, 1136 (N.D. Cal 2012)

All employees, elected officials, contractors and consultants who are in possession or have control of records that are subject to legal hold will be held responsible to carry out the Litigation Hold when notified.

Electronic Records – Includes all forms of electronic communications, including but not limited to email, voice mail, videos, photographs, text messages, or information stored in any mobile devices.

Evidence – All records, whether in electronic or paper form, created, received, or maintained in the transaction of City business, whether conducted remotely or in a City Facility. Evidence may include, but is not limited to, paper, and electronic records stored on hard drives, in the cloud, work station desktops, laptops, personal computers (in some instances), flash drives, CD-ROMs, memory sticks, tapes, zip disk, diskettes, or any mobile devices, regardless of location or ownership (in some cases).

Litigation Hold Notice – An order to cease destruction and to preserve all records, regardless of form, related to the nature or subject of the legal hold. The Litigation Hold supersedes any activities otherwise permitted under the City Records Retention Schedule Policy.

Personnel – Includes all current and former employees, whether permanent, temporary, full-time or part-time, interns, elected officials, contractors, consultants, board, commission and committee members.

Policy

A Litigation Hold will be issued and enforced when circumstances, usually pending or threatened litigation, require the City of Lemon Grove to suspend the normal and routine destruction of records, (b) preserve hard copy and electronic records, including, but not limited to email correspondence, and (c) cooperate with the City Attorney’s Office in collecting, cataloguing and maintaining all affected records once notified in writing of a Litigation Hold.

Notification:

A Litigation Hold Notice will be issued to all affected Personnel subject to the Hold. If a Notice is received that Personnel must read the Notice thoroughly, and complete the attached acknowledgement and response portion of the Notice. This information should be returned to the City Clerk who will provide the information to the Executive Staff overseeing the Hold.

As a preliminary measure when the Notice is received via email an acknowledgement of the message being read and delivered will be captured and retained for the record.

Any Personnel who become aware of any City-related litigation, threat of litigation, demand letter, summons, subpoena, complaint, claim, administrative action, other legal action, or an investigation by any administrative, awareness of an employee accident or incident, must immediately notify the City Manager's Office. The Executive Staff will determine whether to initiate a Litigation Hold and will identify affected Personnel subject to the Hold. If determined a Litigation Hold Notice will be issued as per procedure.

Procedure:

Once acknowledged affected Personnel are obligated to identify and preserve all evidence that may be relevant to the Litigation Hold.

Steps required for Personnel to take to achieve this preservation are the following:

- ❖ Immediately suspend deletion, alteration, overriding, or any other destruction of Electronic Records under their control that are relevant to the Litigation Hold.
- ❖ The City Manager or designee will contact the IT Contractor for suggested methods for preserving Electronic Records. Methods for storing Electronic Records must be approved in advance by both the City Manager and City Attorney.
- ❖ Personnel are to identify the location of the Records they are aware of that may or may not be relevant to the hold and take steps to ensure the Records are no longer subject to destruction under the Records Retention Schedule or automated process or otherwise.
- ❖ Personnel must then advise a member of the Executive Staff of the following:
 - List of the types of Records they are aware of relating to the legal action and their locations;
 - Confirm that any scheduled or automated record destruction process has been cancelled and that the records will be preserved;
 - Identify any other City employees or others that are not City employees that may have Records relating to the legal action;

- Advise of any issues or concerns relating to the accessibility of the Records, how Relevant and Material the information in the Records is likely to be, whether preserving the Record in its current state will be difficult, and any exceptional burdens or costs for preserving and gathering the records; and,
 - If Records are electronic and subject to change over time due to ongoing business requirements City employees should take a screen shot of the information available as soon as the legal hold is implemented and then immediately seek assistance from IT Contractor to see if a “non-erasable point-in-time copy” of the Records can be reasonably obtained.
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- ❖ The Executive Staff will notify Human Resources and IT Contractor of a Litigation Hold and provide the following information:
 - 1. Official Notification of the Litigation Hold and its scope;
 - 2. Identification of all affected Personnel whose electronic accounts must be preserved, including user names, and department, if known; and any other relevant information deemed necessary by the City Attorney.
 - ❖ Identification of the employment status of each affected Personnel as current and former employees, whether permanent, temporary, full-time or part-time, interns, elected officials, contractors, consultants, board, commission and committee members. May also include terminated, and retired personnel if within the scope of the hold.
 - ❖ If Personnel separate from employment with the City during the course of a Litigation Hold, Department Directors, or Managers, or other administrator must take possession of any and all evidence under the control of the separated Personnel and notify the City Attorney in writing.
 - ❖ Once Notice of a Litigation Hold has been issued, the Executive Staff will continue to monitor compliance with this policy and any additional notices required.

Violations:

It is a violation of law and this policy to destroy, alter, withhold, or obscure Evidence once a Legal Hold has been initiated. Violations of this policy are subject to disciplinary action up to and including termination.

Electronically stored data is important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further notice from the City Attorney. Failure to do so could result in disciplinary actions and up to termination. Failure to implement a Litigation Hold could result in significant negative consequences to the City including but not limited to failure to prove its legal claim against others, a court may make an adverse interference against the City for failing to produce Records, the City could be subject to the striking of some or all of its claims or defenses, or the city may have to pay costs or other penalties as a result.

Maintaining the Litigation Hold:

When a hold has been initiated, a member of the Executive Staff most likely the City Clerk is to schedule reminders to the employees identified as likely having Records relating to the legal action; this reminder is to continue to preserve the records and to ensure compliance with the Litigation Hold.

The City Attorney will provide a reasonable schedule to determine whether the hold continues to be necessary, and will notify the Executive Staff when the hold is no longer required.

The City Clerk will then notify all who have been identified as having Records and the records may then be returned to pre-hold status and included in the City Records Retention Schedule. If the record series was due for destruction while on Litigation Hold, they will be scheduled for the next records destruction cycle to maintain proper retention.

Removing the Litigation Hold:

The City Attorney will notify the Executive Staff when the hold is no longer required. Some actions that may cause a Litigation Hold to be removed are:

- Hold will be lifted when a relevant statute of limitations expires
- Settlement or payment
- Judgement and no appeal within time of appeal period
- Agreement with adversary
- Direction from court

The Litigation Hold Notice will:

- ✓ Be in written form
- ✓ Will be timely
- ✓ Describes the matter at issue in layman's terms
- ✓ Provides specific examples of the types of information at issue
- ✓ Identifies potential sources of information and asks custodians to identify others who may hold relevant information
- ✓ Suspends routine destruction policies
- ✓ Informs recipients of the legal obligation to preserve information
- ✓ Informs of potential consequences to the custodian and organization for noncompliance
- ✓ Requires an affirmative response of receipt

LITIGATION HOLD NOTICE

**City of Lemon Grove
Confidential – Memorandum
Attorney-Client Privileged**

Date:

To:

From: City Manager, City Attorney, and City Clerk

**Subject: Notice Regarding Preservation of Documents and Information
Time-Sensitive and Immediate Action Required**

It has come to the attention of the City Manager, City Attorney and City Clerk that a Litigation Hold is necessary for documents involving:

Case Number:

Name of Case:

Identifying information:

Date Range:

You may have actual documents, electronic documents or information as well as tangible objects related to the event involved in this matter. If so, you must preserve and retain those documents, electronically store information and discoverable evidence as per the City of Lemon Grove Litigation Hold Policy.

Records that may be in your possession could include:

Electronic Records – Includes all forms of electronic communications, including but not limited to email, voice mail, videos, photographs, text messages, or information stored in any mobile devices.

Evidence – All records, whether in electronic or paper form, created, received, or maintained in the transaction of City business, whether conducted remotely or in a City Facility. Evidence may include, but is not limited to, paper, and electronic records stored on hard drives, in the cloud, work station desktops, laptops, personal computers (in some instances), flash drives, CD-ROMs, memory sticks, tapes, zip disk, diskettes, or any mobile devices, regardless of location or ownership (in some cases).

If unsure, retain as ask a member of the Executive Team listed on this memorandum.

This is now a legal matter and all conversation and communication is confidential. This is not to be discussed with anyone other than those listed on this memorandum.

An electronic folder has been set up on the shared data drive with the name of:

If documents or information are electronic please drop into the folder mentioned above. If paper records do not scan. These records can be retained in their current format. Provide an inventory of the records available and their location. (A designated location may be set-up to bring the paper documents and any other physical tangible records for review)

Custodians of Record:

If you are identified as a source of information but know of other who may hold relevant information you are required to share that information with the Executive Team listed on this memorandum.

With the issuance of this Notice any records identified that may or may not be relevant to the hold must be protected. Personnel must take steps to ensure the Records are no longer subject to destruction under the Records Retention Schedule or automated process or otherwise.

Violations:

It is a violation of law and this policy to destroy, alter, withhold, or obscure Evidence once a Legal Hold has been initiated. Violations of this policy are subject to disciplinary action up to and including termination.

Electronically stored data is important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further notice from the City Attorney. Failure to do so could result in disciplinary actions and up to termination. Failure to implement a Litigation Hold could result in significant negative consequences to the City including but not limited to failure to prove its legal claim against others, a court may make an adverse interference against the City for failing to produce Records, the City could be subject to the striking of some or all of its claims or defenses, or the city may have to pay costs or other penalties as a result.

Deadline for Records to be provided is:

City Clerk will maintain log of Litigation Hold processes:

Date original litigation hold was issued:

To whom:

Acknowledgements of hold received, signed and submitted to City Clerk

Reminders sent:

A copy of all correspondence and notices will be maintained by the City Clerk as the department of record until released by the City Attorney.

ACKNOWLEDGEMENT OF RECEIPT OF NOTICE**Date:****Case Number:****Name of Case:****Name of Recipient Notice Addressed to:****Identification of any Personnel you believe may have knowledge, information, and/or documents that may be relevant to the above referenced matter:**

_____**Identification of any Relevant Documents or data that you believe may be relevant to the above referenced matter. Please also state format of record (paper, electronic etc.) and its location:** _____

_____**Identification of Computer System and Applications that you believe contain information and/or documents that may be relevant to the above referenced matter:**

Please do not collect and/or send documents to the Executive Team named listed in this Notice until asked to do so. A process will be established to facilitate collection of all materials. Please be sure to preserve all original documents and avoid copying or moving the documents including electronic documents unless it is necessary for ongoing business operations.

If any of the following apply please notify the Executive Team named listed in this Notice Immediately.

- You are notified by IT that you will be receiving a new computer.
- You are changing or rotating positions within the City
- You are planning to retire or terminate your employment with the City soon.

I HAVE RECEIVED AND REVIEWED THE FOREGOING NOTICE.

Signature: _____ Date: _____

Printed Name: _____ Position: _____